SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 490

JOSEPH E. MOSES and wife, JOSEPHINE E. MOSES,

Petitioners

vs.

NORTH CAROLINA STATE HIGHWAY COMMISSION,

Respondent.

BRIEF OF RESPONDENT, NORTH CAROLINA STATE HIGHWAY COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. WADE BRUTON
Attorney General of North Carolina

HARRISON LEWIS
Assistant Attorney General

ANDREW McDANIEL
Trial Attorney

Justice Building
Raleigh, N. C.

INDEX

Opinions below 1

Jurisdiction 2

Question Presented 3

Statement of the Case 3

Argument 4

Conclusion 5

CITATIONS

CASES:

Abdallah v. Highway Comm., 261 N.C. 114, 134 S.E. 2d 81 6

Barnes v. Highway Comm., 257 N.C. 507, 126 S.E. 2d 732 6

Brown v. New Jersey, 175 U.S. 172 2

Carazall v. State, 269 Wis. 593, 70 N.W. 2d 208 5

Durley v. Mayo, 351 U.S. 277 2

Goldblatt v. Hempstead, 369 U.S. 590 6

Midgette v. Highway Comm., 260 N.C. 241, 132 S.E. 2d 599 3

Nick v. State Highway Comm., 21 Wis. 2d 489, 124 N.W. 2d 574, 84 S. Ct. 1125 5

People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 ..... 4, 5

Simmons v. Highway Dept., 195 F. Supp. 516 2

Snow v. Highway Comm., 262 N.C. 169, 136 S.E. 2d 678 6

Williams v. Highway Comm., 252 N.C. 141, 113 S.E. 2d 263 2

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment, Article V 2

Constitution of the United States, Amendment, Article XIV 2

North Carolina Constitution, Art. I, Sec. 17 2

STATUTES:

28 U.S.C. 1257(3) 2

MISCELLANEOUS:

Clark, The Limited Access Highway, 27 Wash. Law Review 111 5

Covey, Frontage Roads: To Compensate or Not to Compensate, 56 Northwestern University Law Review 587 4

Freeways and Rights of Abutting Owners, 3 Stanford Law Review 298 5

In The

Supreme Court of the United States

October Term, 1964

No._____

JOSEPH E. MOSES and wife, JOSEPHINE E. MOSES,

Petitioners

vs.

NORTH CAROLINA STATE HIGHWAY COMMISSION,

Respondent.

BRIEF OF RESPONDENT, NORTH CAROLINA STATE HIGHWAY COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

This civil action was decided by the Supreme Court of North Carolina at its Spring Term, 1964, and is reported as Moses vs. Highway Comm., 261 N.C. 316, 134 S.E. 2d 664. The opinion of the Supreme Court of North Carolina appears also in Appendix A, Petitioners' Petition, pp. 16-23.

Petitioners' motion to rehear in the North Carolina Supreme Court pursuant to Rule 44 of the Rules of Procedure in the Supreme Court of North Carolina, was "examined and denied this 11 June 1964." The notification of the same appears in Appendix A, Petitioners' Petition, p. 24.

JURISDICTION

Objection is hereby made to the jurisdiction of this Court to grant a writ of certiorari in this action.

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3) pertaining to writs of certiorari. No where in the Record does it appear, affirmatively or otherwise, that a Federal question was presented in the lower court or the highest court of North Carolina. Nor does it appear that the North Carolina Supreme Court had to make a decision on a Federal question in determination of this cause. Durley vs. Mayo, 351 U.S. 277, 76 S. Ct. 806.

Petitioners, in their Brief filed with the Supreme Court of North Carolina, asserted the guaranties provided for by Article I, Sec. 17, of the North Carolina Constitution and cases interpreting the same, and made mention of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution applies only to the Federal Government and not the States. Brown v. New Jersey, 175 U.S. 172; Simmons v. South Carolina State Highway Dept., 195 F. Supp. 516; Williams v. State Highway Comm. 252 N.C. 141, 113 S.E. 2d 263.

North Carolina has long recognized and followed the principles of paying just compensation for properties taken under sovereign authority.

> "Our Constitution, Article I, Sec. 17, guarantees payment of compensation for property taken by sovereign authority . . . a constitutional prohibition against taking or damaging private property for public use without just compensation is self executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such

grievance." Midgette v. Highway Comm., 260 N.C. 241, 132 S.E. 2d 599.

Petitioners, in their Petition for Writ of Certiorari, attempt to raise a Federal question, for the first time, by citing the Fourteenth Amendment to the United States Constitution. As stated above, the question was not specifically raised, intimated, or presented, and, even if properly raised, the judgment of the North Carolina Supreme Court rests on adequate independent State grounds with no substantial Federal question existing or required to be passed on by the North Carolina Court in determination of this cause.

QUESTION PRESENTED

Whether an abutting property owner is entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points for access to the through lanes.

STATEMENT OF THE CASE

The opinion of the North Carolina Supreme Court held that the Highway Commission had not taken any property rights of the Petitioners and the Petitioners had not suffered a compensable injury (Appendix A, Petitioners' Petition, p. 23). Under Article I, Sec. 17 of the North Carolina Constitution, compensation must be paid where there is a taking of property. In this action, there was no taking of physical property or property rights, but merely the substitution of a service or frontage road for the previously existing access to U. S. Highway 301. This was accomplished through the Highway Commission's exercising its police powers to regulate the direction flow and diversion of traffic for the protection, safety, and welfare of the traveling public and, more specifically, those entering and leaving the through lanes of travel.

ARGUMENT

Petitioners concede in their Brief that "the weight of authority holds that a property owner has no vested interest in the continued flow of the main stream of through traffic" (Petitioners' Petition, p. 8). Nevertheless, they contend that the substitution of a service road or the designation of an existing road into through lanes and outer lanes for the service roads amounts to a taking of their property abutting said outer lanes.

Each Court decision passing on this problem, and those cited by the Petitioners, must be read carefully as to the facts and the reasoning of the courts to distinguish when the substitution of a frontage road for access is compensable and when it is not. Covey, Frontage Roads: To Compensate or Not to Compensate, 56 Northwestern University Law Review 587, is relied on heavily in the Petition by the Petitioners and was relied on by the Respondent in its Brief and argument to the North Carolina Supreme Court. Mr. Covey's article and other text writers were cited and their conclusions followed in the opinion of the North Carolina Supreme Court. (Appendix A, Petitioners' Petition, p. 22).

It is again important to note that no physical property was appropriated from the Petitioners. Access was simply controlled by the building of a service lane as part of the overall highway which permitted immediate access, via interchange, to the adjacent inter lanes designated for through traffic. Many of the cases cited by the Petitioners in their Petition (pp. 9-10) as permitting recovery involves situations where there was a corollary "taking of land." In *People v. Ricciardi*, 23 Cal. 2d 390, 144 P. 2d 799, cited by Petitioners, the statement was made that the abutter's right of access was a "vested right in a specific traffic avenue carrying a particular burden of traffic." This is certainly not sound reasoning in the light of the conceded weight of authority being to the effect that a property owner has no vested interest in the continued flow of the main stream of through

traffic. The holding in *People v. Ricciardi*, supra, has been criticized in articles entitled Freeways and Rights of Abutting Owners, 3 Stanford Law Review (1951), 298, 306, and Clark, The Limited Access Highway, 27 Wash. Law Review (1948) 111, 125.

This Court most recently (March 30, 1964) denied a petition for writ of certiorari in *Nick v. State Highway Comm. of Wisconsin*, 21 Wis. 2d 489, 124 N.W. 2d 574, petition denied March 30, 1964 in 84 S. Ct. 1125. In the original State Court opinion of *Nick v. Wis.*, 13 Wis., 2d 511, 109 N.W. 2d 71, the Wisconsin Supreme Court followed the reasoning in *Carazalla v. State*, 269 Wis. 593, 608b, 70 N.W. 2d 208, 71 N.W. 2d 276 and said:

> "We approved the conclusion of textwriters that if no land is taken for the converted highway but the abutting landowner's access to the highway is merely more circuitous, no compensation should be paid, and our decisions embodied that principle."

Certiorari to this Court was sought by Mrs. Nick on a subsequent administrative denial of a driveway permit when she had access from her property to Highway 30 by means of Calhoun Road.

CONCLUSION

Sound reasoning indicates that where unregulated access and the intermixing of through taffic and local traffic are permitted, highway effectiveness or efficiency declines and, as a consequence, roadside businesses, depending on such traffic, deteriorate. Where police powers are properly exercised for the benefit of the public and traffic is separated and channelized within the existing right of way, it would appear to facilitate rather than retard the development of properties and maintain longer the value of these abutting properties.

This case is not a question of a taking of property without payment of just compensation. It is a question of the exercise of the police powers of the State of North Carolina, through its agency, the State Highway Commission, for the promotion of public safety and welfare. A prohibition simply upon the lanes of travel an abutting property owner must use, along with other members of the public, cannot, in any just sense, be deemed a taking or an appropriation for the public benefit. Barnes vs. Highway Comm., 257 N.C. 507, 126 S.E. 2d 732; Snow vs. Highway Comm., 262 N.C. 169, 136 S.E. 2d 678; Abdalla vs. Highway Comm., 261 N.C. 114, 134 S.E. 2d 81; Goldblatt vs. Town of Hempstead, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987.

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

T. WADE BRUTON
Attorney General of North Carolina

HARRISON LEWIS
Assistant Attorney General

ANDREW McDANIEL
Trial Attorney

Counsel for the N. C. State Highway Commission, Respondent

Justice Building
Raleigh, N. C.